

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HENRY TAYLOR,

Defendant-Appellant.

UNPUBLISHED

June 11, 2013

No. 309145

Tuscola Circuit Court

LC No. 07-010401-FH

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of 11 to 25 years in prison imposed on remand on his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

Defendant was originally sentenced to serve 11 to 25 years in prison. This Court affirmed his sentence on his first appeal by right, *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 284983) (SHAPIRO, J., concurring in part and dissenting in part), but our Supreme Court remanded for resentencing because offense variable (OV) 10 of the legislative sentencing guidelines was improperly scored, *People v Taylor*, 486 Mich 904, 904-905; 780 NW2d 833 (2010). On resentencing, the trial court corrected the score for OV 10, but offset the decrease in the OV level by scoring OV 12 at five points. On appeal, this Court held that the trial court erred in scoring OV 12, vacated defendant's sentence, and remanded for resentencing. *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2011 (Docket No. 298957). On March 5, 2012, the trial court resentenced defendant again to 11 to 25 years, which now constituted an upward departure from the sentencing guidelines. On appeal, defendant argues that the trial court failed to articulate substantial and compelling reasons for the upward departure.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), as is the extent of the departure, *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.*

In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, 469 Mich at 270.

A court may depart from the sentencing guidelines range if it states substantial and compelling reasons for the departure on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors meriting departure must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Smith*, 482 Mich at 299. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, "that the characteristic was given inadequate or disproportionate weight." MCL 769.34(3)(b). To ascertain whether a factor was given inadequate or disproportionate weight, a court must first determine the effect of the factor on the recommended minimum sentence range. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). Departure should occur only in exceptional cases. *Babcock*, 469 Mich at 257.

The trial court stated that defendant's "whole history and the propensity towards violence shown is a clear and compelling reason . . . to sentence . . . outside the range." "The entirety of his assaultive behavior is my underlying reason," the court reiterated. The court indicated it was looking at defendant's history since he was 17 years old. Although the trial court's explanation for deviating was somewhat wanting of detail, we nevertheless affirm defendant's sentence.

Defendant has three prior convictions for assault with intent to do great bodily harm less than murder. Assault with intent to do great bodily harm less than murder is a high severity felony (Class D). MCL 777.16d. Pursuant to MCL 777.51(1)(a), a defendant must be assessed 75 points for PRV 1 if he has three or more prior high severity felony convictions. Defendant's prior assault-based convictions are addressed by the sentencing guidelines and the trial court did not indicate that it was given inadequate or disproportionate weight when calculating defendant's sentence. And, plaintiff acknowledges that defendant's prior assault-based convictions are addressed by the sentencing guidelines.

Defendant's assaultive behavior in prison is, however, a valid reason for making an upward departure. The accumulation of prison misconduct tickets has been found to be a substantial and compelling reason to justify an upward departure. See *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Defendant received four major misconduct tickets for assaultive behavior since he was incarcerated on the current charge: three major misconducts for fighting and a major misconduct for assault and battery on a prison inmate. Defendant also received a major misconduct for assaulting another prison inmate in December 2007, and accumulated 13 minor misconduct tickets from 1996 through 2003. Defendant's history of misconduct while in prison is objective and verifiable and it is not accounted for in the sentencing guidelines.

Defendant argues that he has not accumulated enough major misconduct tickets to keenly attract the court's attention. In support he points to *Watkins* where the defendant accumulated 14 misconduct tickets. *Watkins*, 209 Mich App at 5. *Watkins* does not establish a minimum level

that must be reached before prison misconduct can be considered by a court as a reason to depart from the sentencing guidelines. In any event, defendant's 18 prison misconduct tickets is a significant prison history.

Defendant's most recent major misconduct tickets for assaultive behavior provide a substantial and compelling reason by themselves to depart, particularly because they follow a fourth conviction for assault with intent to do great bodily harm less than murder, and because they occurred while defendant was under the authority of the State. The assault on a prison inmate in 2007 serves to punctuate defendant's history of violent criminal activity. This is the type of fact that understandably grabs a court's attention and is of considerable worth in deciding the length of defendant's sentence.

The court also referenced the "shortness of [defendant's] ability to be outside of the system when the behavior occurred again." Defendant was paroled on May 8, 2007, and he was still on parole when he committed the instant offense on June 25, 2007. This short length of time is objective and verifiable. Furthermore, this factor is not accounted for in the sentencing guidelines. Although ten points must be assessed pursuant to PRV 6 if the defendant is on parole, MCL 777.56, PRV 6 does not award any points for the length of time between being paroled and committing the sentencing offense. This is a valid reason for the court's upward departure.

Because one of the reasons articulated by the trial court is invalid, we must determine whether the trial court would have departed from the guidelines range to the same extent regardless of the partially invalid factor. *Babcock*, 469 Mich at 260. If the trial court would have imposed the same sentence regardless of a misunderstanding of the law or an irregularity in the proceedings, this Court may affirm. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). In this case, the trial court stated that it felt 132 months to 25 years was "appropriate given the entirety of [defendant's] life." "It's just more of the same," the court explained. Given these statements, and the fact that the trial court has imposed the same sentence on three different occasions, we conclude that the court would have departed to the same extent even without considering the invalid reason cited.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra